NO. 89-585

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GREGORY R. McDONALD, WILLIAM L. GARRISON, JR., SANDRA BAXTER, T. WYATT BAXTER, DOUGLAS J. ZIMMER MERRI JO ZIMMER, SAMUEL J. BASSO and COLLEEN McDANELD,

Petitioners,

v.

THE SECOND AMENDMENT FOUNDATION and ALAN M. GOTTLIEB

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Table of Authorities

Other Authorities

I. RESPONSE TO PETITIONERS' STATEMENT OF THE CASE.

Mr. McDonald's statement of the case is incomplete, frequently wrong and always sharply slanted. The trial court's Findings and Conclusions[1] and the Washington Court of Appeals opinion[2] give a dispassionate statement of the true facts.

This is not a case, as McDonald puts it, of "a state court system run amok". The trial court listened for six full weeks to McDonald's[3] irresponsible shotgun allegations

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[1] Appendix D to the Petition for Writ of Certiorari

[2] Appendix A to the Petition for Writ of Certiorari

[3] Greg McDonald, former executive director of the Second Amendment Foundation, leads and dominates his group, who are the petitioners. See Court of Appeals Opinion, attached to Petition for Writ of Certiorari at A-4. Mr. McDonald writes the briefs and memoranda for his group. The petitioners are referred to collectively in this response as "McDonald" or "the McDonald Group".

against Alan Gottlieb and the Second Amendment Foundation's Trustees. The trial court had the opportunity to observe Mr. McDonald and his friends on the witness stand at length. After doing so, it entered detailed Findings of Fact and Conclusions of Law dismissing every one of McDonald's accusations. Most of the charges were dismissed at the conclusion of the plaintiffs' case, when McDonald failed to make even a prima facie case. But then, it was too late. McDonald and his group had, for more than a year, repeatedly sent mass mailings to the Foundation's high dollar donors and to every significant gun-related publication in the country, trumpeting as fact -- without having to prove -- their accusations. McDonald's mass mailings, which he has not certified up to this Court or included as one of his many appendices, were virulent, accusing Alan Gottlieb of stealing money from the contributors and

systematically engaging in criminal conduct. The resulting defamation claim against McDonald and his colleagues was not used as a "political weapon." It was the only remedy the legal system provides.

The state court appellate system likewise gave McDonald every opportunity to present his case. It granted him extensions of time to file his Brief on Appeal. (He filed his opening brief a full year after the trial court entered its written judgment.) Washington State's appellate rules allow 70 pages for a brief on appeal. McDonald asked for and received, over objection, permission to exceed those limits, and he filed a 157 page brief. Two weeks before oral argument, McDonald sought leave to file what was represented to be an amicus curiae brief. The Foundation and Mr. Gottlieb

objected.[4/] The appellate court allowed the amicus brief to be filed. Washington's appellate rules limit an amicus brief to 30 pages. This one was 74 pages. McDonald had the opportunity to move the appeallate court for reconsideration. He did. He lost. He had the right to petition the State Supreme Court for review. He did. He lost. McDonald has nothing to complain about except the result: he has been unable to convice a single judge on a single claim to date.

McDonald consistently fails in his Petition to present with accuracy the facts surrounding this case. He states as fact, at page 3, that this is a case of (1) "concerned citizens"

[4/] The Foundation and Mr. Gottlieb contended that the brief reflected no familiarity with the true facts of the case, appeared biased, and raised totally new issues. Indeed, shortly after the Court of Appeals issued its decision, the author of the "amicus" brief, who was personally acquainted with Mr. McDonald, began representing McDonald and his friends as their counsel.

(2) who attempted to blow the whistle (3) on "someone . . . who diverts [charitable] funds for his own benefit." This misrepresents the case:

(1) McDonald and his group are all ex-employees with an axe to grind. The Court of Appeals opinion describes the dispute as "a major 'corporate battle' for control of SAF" between McDonald and Alan Gottlieb. Appendix A to Petition for Writ of Certiorari, at A-4.

(2) The trial court found as a fact that none of them had tried to "blow the whistle" on anything. (Finding of Fact 58).

(3) The trial court entered findings and conclusions that:

> Mr. Gottlieb did not illegally divert contributions from SAF to his use.

Finding of Fact 72. And:

> Alan M. Gottlieb has not misused SAF funds, or illegally diverted financial contributions from SAF.

Conclusion of Law 4. The trial court further concluded that neither Mr. Gottlieb nor the

trustees breached any fiduciary duties. (Conclusions of Law 5, 6, 7.) McDonald ignores these facts and gives this Court a distorted picture of this case.

McDonald flatly declares as fact, at page 3, that on August 31, 1984 he and his friends "were fired from their jobs with SAF by Alan M. Gottlieb and by Michael Kenyon, acting on instructions of Gottlieb." This is not true. The trial court found that on August 31, 1984, while Mr. McDonald was fired,

> Neither Mr. Gottlieb, nor SAF, fired other SAF employees on or around August 31, 1984. Those employees who did not return to work the following work day did so because they had elected to join with Mr. McDonald in suing SAF and Mr. Gottlieb.

Finding of Fact 59. The Court of Appeals found "overwhelming support" for this finding of fact. Court of Appeals opinion, attached as Appendix A to Petition for Writ of Certiorari, at A-13. McDonald simply ignores the facts, and presents this Court with his lonely and twisted personal interpretation of reality.

At page 4, McDonald states he filed his complaint that same day, which is incorrect. McDonald apparently wishes to imply that he and his group were fired because they filed the complaint. A summons, alone, was filed that day after McDonald was fired. The Complaint was not filed until several days later.

As page 4, incredibly, McDonald states as a fact, that

> "Petitioners' employment was terminated because they had questioned Gottlieb's use of SAF funds and what they perceived to be his self-dealing."

The trial court specifically addressed this accusation and found that not only was it false, but McDonald's group knew it was false. See the trial court's detailed recitation of the facts in Findings of Fact 55-60. McDonald did not assign error to finds nos. 56-58 and the Court of Appeals held that

the other findings were supported by either substantial or overwhelming evidence. See Appendix A to Petition for Writ of Certiorari, at A-9, A-13.

At pages 4-6, McDonald paraphrases in mild language some of the allegations from his Complaint. This was not the language used in his Complaint and it certainly was not the language he used in his defamatory mass mailings. In any event, the trial court found every one of these allegations to be factually or legally without merit, and the Court of Appeals after reviewing the huge record found substantial or overwhelming evidence to support the trial court's findings. It seems a bit odd for McDonald to recite here his discredited suspicions. But when McDonald states as fact that "these concerns" were what lead to his firing, he seriously misrepresents the record. See Findings of Fact 55-60, ibid.

At page 6 McDonald states blandly as fact that his group "formed an ad hoc committee" and began mailing "newsletters" to Foundation members "to keep them informed of the litigation". McDonald fails to advise the Court that his ad hoc committee (1) took confidential lists of the Foundation's donors while they were employed by the Foundation (Findings of Fact 78, 79), (2) targeted their mailings at some of SAF's best contributors (on one occasion, about 7,000 such contributors) (Finding of Fact 63), (3) published many false and defamatory statements in those mailings (Findings of Fact 53-60), (4) used the Foundation's donor lists to solicit over $22,000 in contributions on their own behalf (Finding of Fact 80), and (5) used names and format in their fundraising confusingly similar to the Foundation fundraising solicitations. McDonald misleads when in his Petition he tells this Court that

his group just "published a newsletter which was mailed to SAF members to keep them informed of the litigation".

At page 6, McDonald represents as fact that the Foundation and Mr. Gottlieb filed a complaint stating that "the . . . mere act of filing a complaint against Gottlieb and SAF was itself defamation." This is inaccurate. McDonald didn't just file a complaint. Unlike most litigants, when McDonald filed his complaint he and his group held a press conference and distributed press releases attacking the Foundation and Mr. Gottlieb.

Shortly after filing his complaint, and long before trial, McDonald moved for appointment of a temporary receiver for the Foundation. A show cause hearing was held in early November, 1984 (nearly two years before the trial court's October, 1986 Findings and Conclusions). McDonald quotes phrases from the court

memorandum following that preliminary hearing, and inexplicably attaches that order (without a date) as Appendix F. That interlocutory order ceased to be of any effect once trial began, and it played no role in the trial. It is true that McDonald's accusations at that early hearing created concern in the mind of the hearing judge. Among other things, that judge ordered Coopers & Lybrand, the Big Eight accounting firm which regularly audited the Foundation, to prepare a report analyzing McDonald's claims. After the full trial, which considered the Coopers & Lybrand audit report, all of those concerns were found to be unwarranted.

It appears that McDonald quotes this interlocutory order for the proposition that (1) there had been a judicial "finding" that all of his group "had been fired", and (2) he later simply repeated what the judge said. This is false. The petitioners' termination of

employment was not even an issue at the temporary receivership hearing. The issue was whether a receiver should be appointed. Defamation issues were not addressed. The hearing judge's comment was simply part of his reciting what appeared to be uncontested background events. The trial court, following trial, found as a fact that McDonald's friends had not been fired, they knew it, and they lied knowingly when they said they had been. Findings of Fact 55-60. The earlier hearing judge's comment did not change the facts, or what the McDonald group knew to be true. See further discussion infra, at 23-24.

At page 7, McDonald recites without support a purported series of events surrounding his Motion for Summary Judgment. McDonald omits to advise the Court that he (1) never objected to the trial court postponing decision on his Motion for Summary Judgment, and (2) did not on

appeal assign error to, or argue, those procedural events.[6] See discussion at 26-28, infra.

A. The Appellate Court Did Not Fail to Conduct a Constitutionally Adequate Review of the Trial Court Record.

McDonald's argument turns totally on the factual assumption that the Washington Court of Appeals failed to "conduct an independent examination of the evidence." This suggestion is baffling. The trial record, consisting of

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[6] The "amicus" brief, filed two weeks prior to oral argument, attempted to raise some of these many new issues, including the denial of the Summary Judgment motion. Under Washington law, appellate courts will not pass on issues raised only by amici curiae. Schuster v. Schuster, 90 Wn.2d 626, 629, 585 P.2d 130 (1978); Long v. Odell, 60 Wn.2d 151, 154, 372 P.2d 538 (1962). The Court of Appeals opinion did not address these issues.

more than 20 volumes of testimony, hundreds of exhibits, and voluminous clerks papers, was certified up to the Court of Appeals. The Court of Appeals' opinion repeatedly refers to reviewing the trial court record. It is unclear what more McDonald would have the Court of Appeals do. McDonald provides no support for the factual proposition that the Court of Appeals here failed to independently review the record.

Petitioners appear to urge that they have some argument analogous to that presented in Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 80 L. Ed. 2d 502, 104 S. Ct. 1949 (1984). McDonald never raised this argument on appeal.[7] In that case, the plaintiff won a defamation judgment. A federal Court of Appeals reversed the trial court

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[7] See footnote 6.

finding of actual malice. The plaintiff appealed, alleging that Fed.R.Civ.P. 52 restricted the Court of Appeals in its review of the trial court's findings of fact. Fed.R.Civ.P. 52 provided, in part, that

> Findings of fact . . . shall not be set aside unless clearly erroneous. . . .

The U.S. Supreme Court granted certiorari

> to consider whether the Court of Appeals erred when it refused to apply the clearly erroneous standard of Rule 52(a) to the District Courts "finding" of actual malice.

466 U.S. at 493; 80 L. Ed. 2d at 511-512; 104 S. Ct. at ___. The Supreme Court held that it had not. The Court held that Fed.R.Civ.P. 52 did not prescribe the standard of review to be applied to findings of malice in defamation cases, and appellate judges in such a case must

exercise independent judgment and determine whether the record establishes actual malice with convincing clarity. 466 U.S. at 514; 80 L.Ed.2d at 526; 104 S.Ct. at ___.

No similar issue exists here. Washington's Superior Court Rules do not contain the language at issue in Bose limiting appellate review of factual questions to a "clearly erroneous" standard. Washington appellate courts review the entire record and require that there be substantial evidence to support the trial court's findings.

Here, the trial court entered findings of fact that McDonald's group had published many defamatory and false statements of fact (Findings of Fact 53-55). The court then held that "it was established by clear and convincing evidence" that many of the statements were published (1) with reckless disregard as to

their falsity, and (2) with actual knowledge that certain of their statements were false. (Findings of Fact 60) These are the legal equivalent of "actual malice". Hart-Hanks, Communications, Inc. v. Connaughton, 491 U.S. ____, 105 L.Ed.2d 562, 589, 109 S.Ct. ____ (1989).

The Court of Appeals, in its written opinion, held that there was substantial evidence to support the trial court's findings that such facts had been proved by clear and convincing evidence. Despite these trial and appellate court findings based on the evidence before them, McDonald states flatly, and wrongly, to this Court that the record was "absent" any evidence of malice. Petition for Cert., at 13, 14.

B. Evidence Was Introduced at Trial Establishing Actual Damages, and the Trial Court Did Not Award Damages for Privileged Statements.

The Washington State Court decisions here are consistent with the law declared by the Supreme Court. It is not statements of law, or applications of law, of which McDonald complains. He disagrees with factual findings. He complains about the lower court results. These are the core of his assertions of "constitutional error". These do not create issues appropriate for a Writ of Certiorari.

The trial court found that McDonald's group made statements with reckless disregard as to truth or falsity, and knowing specifically that certain statements were in fact false. (Findings of Fact 60). These findings legally support and justify the trial court's conclusion that defamatory statements were made "wilfully and with actual malice" (CL 16). Hart-Hanks Communications, Inc. v. Connaughton, supra.

McDonald states as a fact that "no . . . evidence of actual damages was introduced." Petition, at 16. This is false.

The trial court found as a fact that there were actual damages:

> As a result of publication of the false and defamatory statements, both Alan Gottlieb and SAF suffered actual damages. Alan Gottlieb was injured in his reputation and suffered mental anguish and personal humiliation. SAF was injured in its reputation and suffered an actual decline in contributions.

The Court of Appeals, reviewing the Repondent's claim that the damages awarded were too low, held that

> There was evidence of actual damage presented at trial and the trial court limited the award because a substantial portion of the damage was brought about by publication of statements in the areas in which the McDonald group had a qualified privilege to report. After a review of the record, we agree with the trial cout and find the damages awarded are within the range of the evidence presented and therefore adequate.

(Emphasis added.)

Opinion, attached as Appendix A-1 to McDonald's Petitition for Certiorari, at A-11.

McDonald may disagree with these factual conclusions and with the sufficiency of the evidence, but these disagreements are not grounds for a Writ of Certiorari.

McDonald complains that the trial court failed to segregate the damages he caused from damages suffered as the result of statements made on subjects protected by a qualified privilege.[8/] In fact, the trial court did (although it was not required to) segregate injury caused by statements covered by a qualified privilege (Findings of Fact 67) and

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[8/] McDonald also tries to argue that Mr. Gottlieb's reputation was already so damaged by his personal income tax problem that, apparently, it couldn't be hurt further by malicious lies. The trial court heard evidence, including far more evidence than that cited by McDonald, and concluded that Mr. Gottlieb's reputation was further damaged and reduced by McDonald's attacks.

explicitly did not award damages for those injuries (Conclusions of Law 17).[9/]

C. The Trial Court Did Not Err in Finding Statements by McDonald's Group to be Defamatory.

It is an exercise in the ridiculous when McDonald quotes from this Court's opinions for the proposition that in reporting on matters of public debate "some error is inevitable", "albeit regrettable". The trial court had before it vicious, repeated, calculated, defamatory mass mailings carefully targeted to Foundation contributors and important gun-rights individuals and organizations. It found there were many defamatory statements, published with actual malice (Findings of Fact 53-60, 68, 69;

9/ The Foundation and Mr. Gottlieb argued on appeal that, since the trial court found McDonald had abused the qualified privilege, damages should have been awarded for those statements as well. Restatement 2d of Torts, §§ 603, 604; Bender v. Seattle, 99 Wn.2d 582, 664 P.2d 492 (1983); Ward v. Painters Local Union, 41 W.2d 859, 252 P.2d 253 (1953).

Conclusion of Law 16). We are not dealing here with some inevitable, regrettable, "error".

McDonald does not explain or argue his apparent position that the State courts' statements of law, or application of law, are inconsistent with this Court's opinions.

McDonald cites no law for the proposition that a trial court's factual findings have to be any more "specific" than were the findings here.[10] The parties, on appeal to the Washington State Court of Appeals, argued whether sufficient evidence was presented in the record to support those factual findings. The Foundation and Mr. Gottlieb cited the Court of Appeals to voluminous support in the record for those findings. The appellate court found either substantial or overwhelming evidentiary

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[10] In fact, the Foundation sought detailed listings of the defamatory statements in the Findings and Conclusions and McDonald argued with success against that level of detail in the Findings and Conclusions.

support for the trial court's factual findings. That is all the appellate review appropriate on this issue.

McDonald misrepresents when he suggests, at page 18, that the show cause hearing judge shortly after the filing of the Complaint "found" the McDonald group's statements about their firing "to be true". As discussed earlier the show cause hearing occurred before McDonald's hate campaign began. Defamation issues were not tried. Whether McDonald's group had been fired was not an issue. No "finding" was necessary to reach the receivership issue before the court, and the judge's comment was nothing more than a passing reference to what he thought was an uncontested background event.

McDonald's factual statement, that petitioners just "repeated the statement found to be true by one judge", is seriously false.

Compare the simple (though inaccurate) mention by the show cause judge that "the plaintiffs . . . were fired by Mr. Gottlieb, Foundation president, on August 31, 1984" with the trial court's finding No. 55, reciting the McDonald group's defamatory story regarding their termination. McDonald's group was not found guilty of defamation for repeating the judge's simple inaccurate statement that they "had been fired."

D. The Trial Court Did Not Find That Statements of Opinion or Anecdotes, the Filing of Legal Actions, etc. Were Defamatory.

Neither the trial court Findings and Conclusions, nor the Court of Appeals opinion, held that (1) statements of opinion or anecdotes, (2) the mere reporting of requests of government investigations, or (3) the filing of legal actions, were defamatory. McDonald simply misreads, or misrepresents, the materials appended to his Petition as appendices A and D.

McDonald, in this section, also appears unable to distinguish between (1) the fact of defamation, and (2) the abuse of a qualified privilege, which are distinguished and treated in the trial court's Findings of Fact as separate legal issues.

E. The Appellate Court Did Not Find that the Alcatraz Postcards Were Defamatory.

Again, the trial court cited the mailing of postcards to Mr. Gottlieb's wife, Mr. Gottlieb and others, as an example of the McDonald group's abuse of a qualified privilege to make statements to persons interested in the same subject matter. Not as defamations. Facts constituting abuse of a qualified privilege (e.g., excessive publication) are different from the facts making a statement defamatory.

In any event, as is discussed above, the trial court declined to award damages for statements that initially were covered by a qualified privilege (notwithstanding that the

privilege was abused). The trial court awarded no damages resulting from the emotional distress inflicted by the Alcatraz postcards.

F. The Appellate Court Did Not Err in Upholding the Trial Court's Decision on McDonald's Summary Judgment Motion.

Under Washington law denials of summary judgment are not generally appealable following an actual trial on the merits. See Court of Appeals opinion attached as Appendix A to Petition for Writ of Certiorari, at A-6. McDonald fails to explain how this argument creates any constitutional issue, or any conflict with the decisions of the United States Supreme Court.

McDonald does not accurately present the events below. For example, McDonald asserts that "the trial court refused to hear the Petitioners' motion for summary judgment before trial", without mentioning that (1) McDonald did not object to postponements of his motion, (2)

McDonald did not assign error to the postponements of his motion, and (3) McDonald did not raise on appeal the manner or timing of the trial court's summary judgment decision.[11]

Supreme Court Rule 21(h) requires a party making claims like McDonald's to factually demonstrate that the alleged issue was properly raised and preserved below:

> "If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court' charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction

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[11] The amicus curiae brief raised this for the first time on appeal two weeks before oral argument. See Footnote 6, supra.

> to review the judgment on writ of certiorari."

McDonald fails to provide any of this information in connection with the denial of his summary judgment motion.

McDonald's conclusory declarations that the defamation complaint was somehow technically defective are just that -- bald conclusions. No supporting law. No factual explanation. No indication that this was properly preserved on appeal (it wasn't). No compliance with Rule 21(h).

McDonald's complaint about "allowing general allegations of defamation to be made without identifying those specific statements" is seriously misleading. McDonald, over the course of his year-long hate campaign, published, almost monthly, repeated and new volleys of false and defamatory statements. Shortly before trial, the trial court required the Foundation and Mr. Gottlieb to assemble, and list

specifically, each and every statement alleged to be defamatory. The parties compiled 67 pages of specific statements. That 67 page document was the focus of much of the trial. The allegations of defamation were totally specific.

Again, McDonald fails to comply with Rule 21(h) here for a reason: he raised no similar complaint before the trial judge.

G. Conclusion.

McDonald's petition for a Writ of Certiorari turns totally on the facts, and he does not accurately present those facts. McDonald did not certify to this court any of the factual record on which he supposedly relies. However, the trial court's Findings and Conclusions, and the Court of Appeal's opinion, consistently contradict the factual predicates on which McDonald's arguments are based. If the State court's factual findings are supported by the evidence at trial, then there is no error. The

judicial system has given Greg McDonald more opportunity than he deserves to present and argue the facts. It is not for the United States Supreme Court to review, yet again, the sufficiency of the evidence. No Writ of Certiorari should issue.

DATED: November 2, 1989.

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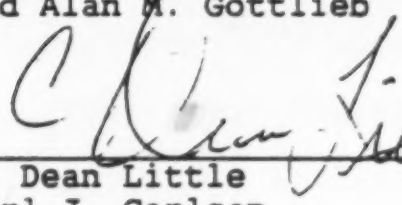

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APPENDIX A

Corrections to Petitioners' Appendices D & E

At D-23 Finding 58 should read: ". . . Mr. McDonald's termination resulted <u>from</u> personality conflicts. . . "

At D-24 Finding 60 should read: ". . . with reckless disregard as to whether they were false <u>or</u> misleading. . . . "

At E-3, (Judgment & Injunction) a portion of the Judgment is omitted. Judgment ¶¶ 4 and 5 read as follows (the omitted material is underlined):

> 4. The Second Amendment Foundation is awarded judgment against Gregory R. McDonald, William L. Garrison, Samuel J. Basso, Douglas Zimmer and Jane Doe Zimmer, and the marital community composed thereof ("Zimmer", below), Sandra Baxter and T. Wyatt Baxter, and the marital community composed thereof ("Baxter", below) and Colleen McDaneld as follows:
>
> (a) <u>Against Gregory R. McDonald, in the amount of $2,500; and</u>

(b) Against Garrison, Basso, McDaneld, Baxter and Zimmer, in the amount of $1,000 each;

(c) Provided, however, that the Second Amendment Foundation shall recover on the amounts set forth above no more than the total sum of $5,000.

5. Gregory R. McDonald, William L. Garrison, Samuel J. Basso, Colleen McDaneld, Sandra Baxter and T. Wyatt Baxter, Douglas Zimmer and Jane Doe Zimmer, and all persons acting in concert or participation with them, are hereby permanently restrained and enjoined, as follows:

(a) From transacting, or attempting to transact, any business for or on behalf of The Second Amendment Foundation ("SAF").

(b) From taking possession of any additional documents, or property, of SAF.

. . . . (Etc.)